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12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 FLATWORLD INTERACTIVES LLC, a
Pennsylvania limited liability company,
17
Plaintiff,
18
v.
19 APPLE INC., a California corporation,
20
Defendant.
21

No. C 12-01956 JSW

**DECLARATION OF RYAN MEYER
IN OPPOSITION TO APPLE INC.'S
MOTION TO DISQUALIFY HAGENS
BERMAN SOBOL SHAPIRO LLP**

Noticed hearing date and time:
July 26, 2013, 9:00 AM, Courtroom 11

1 I, Ryan Meyer, declare:

2 1. I am an attorney at Hagens Berman Sobol Shapiro LLP (“Hagens Berman”),
3 attorneys of record for FlatWorld Interactives LLC (“FlatWorld”) in this matter. I make this
4 declaration based upon my personal knowledge and am competent to testify as to the matters stated
5 herein.

6 2. I have been involved with the present case since at least October, 2012.

7 3. I have never met or spoken with John McAleese. I do not regard him as co-counsel
8 to Hagens Berman in this litigation.

9 4. I was unaware that Jennifer McAleese had forwarded any email communications
10 and/or Apple pleadings from Hagens Berman to John McAleese.

11 5. The first time that I learned of any relationship between Morgan Lewis & Bockius
12 LLP (“MLB”) and Apple Inc. (“Apple”) was after John McAleese’s call to Mark Carlson on
13 February 26, 2013.

14 6. I have been the attorney primarily responsible for gathering FlatWorld’s documents
15 and its document production. To the best of my knowledge, all documents in the possession,
16 custody, or control of FlatWorld, Jennifer McAleese, or Slavoljub Milekic that are responsive to
17 this Court’s disclosure requirements or Apple’s discovery requests have either been produced or
18 listed on a privilege log, though a small number of responsive documents were unintentionally
19 overlooked. I am not aware of any documents that have been intentionally destroyed, concealed, or
20 mischaracterized, or that are responsive but intentionally withheld and not logged. When I worked
21 with FlatWorld to locate and produce documents, our strategy was to cast as wide of a net as
22 possible to identify and either produce or log every document in FlatWorld’s possession that could
23 reasonably be responsive to Apple’s discovery requests or that was clearly relevant to some claim
24 or defense in this case. FlatWorld has updated and corrected its privilege log as necessary, with the
25 last update being sent to Apple on May 31, 2013.

26 7. Apple alleges that some documents appear on the privilege log of John McAleese or
27 MLB but not the privilege log of FlatWorld, and that this somehow indicates that FlatWorld and/or
28 Hagens Berman has either hidden or intentionally destroyed documents. No documents have been

1 hidden or intentionally destroyed by either FlatWorld or Hagens Berman, and Apple's allegations
 2 and innuendo to the contrary are false. To determine the status of each document that Apple
 3 alleges was intentionally withheld or destroyed, Hagens Berman has undertaken to examine the
 4 privilege logs and each of the underlying documents. The results of that investigation, and the
 5 differences in the documents listed on the privilege logs, are explained as follows:

6 a. Eighty-two of the emails, email threads¹, or other documents appearing on the
 7 privilege log of John McAleese or MLB but not on FlatWorld's privilege log do not appear to be
 8 responsive to any discovery request served on FlatWorld prior to June 6, 2013. FlatWorld, John
 9 McAleese, and MLB each responded to different sets of requests for production. Apple served one
 10 set of requests for production on FlatWorld in November, 2012, well before Apple became
 11 concerned about John McAleese, and three sets of requests since February, 2013. The first two of
 12 the most recent sets of document requests were directed to (1) discovery in the filed LG and
 13 Samsung cases which involve the patent-in-suit and (2) the materials that FlatWorld plans to use at
 14 the claim construction tutorial. Until June 6, none of Apple's requests for production to FlatWorld
 15 mentioned John McAleese, and none of them requested every communication that FlatWorld or its
 16 principals have ever had with any entity, regardless of the subject of that communication.² By
 17 contrast, Apple has requested that John McAleese and MLB produce any communications with or
 18 relating to FlatWorld or its principals, regardless of subject matter or relevance to the claims or
 19 defenses of the present case. As one example, Request No. 2 of the March 1, 2013 subpoena to
 20 John McAleese seeks "[a]ny communications between You and Jennifer McAleese that relate to
 21 FlatWorld Interactives, Slavoljub Milekic, Gordon Nelson, John J. Kenney, Michael Bonella,
 22 Kevin Casey, Jonathan Taub, Cecil Key, or any party representing or affiliated therewith, including
 23 any attorney acting for or on behalf of any of the listed people or entities, and including without
 24 limitation any communications relating to U.S. Patent RE43,318 or U.S. Patent 6,920,619."

25 ¹ Each email thread appearing on the privilege logs of John McAleese or MLB was separated
 26 into its individual subsections, thus expanding the number of entries on those logs.

27 ² Apple served requests for production on the evening of June 6, 2013 which, for the first time,
 28 broadly seek these previously non-responsive, and immaterial, documents from FlatWorld.
 FlatWorld will respond and/or object to these requests and produce or log any responsive
 documents.

1 Similarly, Request No. 1 of the March 1, 2013 subpoena to MLB seeks “[a]ny communications
2 between You, including any of your partners, associates, and employees (and specifically including
3 John J. McAleese), and FlatWorld Interactives, Slavoljub Milekic, Jennifer McAleese, Gordon
4 Nelson, John J. Kenney, Michael Bonella, Kevin Casey, Jonathan Taub, Cecil Key, or any party
5 representing or affiliated therewith, including any attorney acting for or on behalf of any of the
6 listed people or entities, and including without limitation any communications relating to U.S.
7 Patent RE43,318 or U.S. Patent 6,920,619.” As a result, Mr. McAleese and MLB listed on their
8 privilege logs, as one example, emails in which John McAleese and Jennifer McAleese discussed
9 meeting with a CPA who helped FlatWorld file its taxes because this qualified as any
10 communication involving John McAleese relating to FlatWorld. Apple did not serve this request
11 for production on FlatWorld. FlatWorld never produced or logged these communications because
12 none of Apple’s requests for production reasonably sought such documents (until Apple served
13 new requests for production on June 6) nor do they have any obvious relevance to any claim or
14 defense in the case (in this example, Apple did not request from FlatWorld communications
15 relating to FlatWorld’s tax planning nor is it clear how such documents would be relevant to any
16 claim or defense in this case). As another example, certain of the documents were not responsive
17 because they contained attorney-client communications dated after the date the Complaint in this
18 case was filed, and both Apple and FlatWorld have followed a procedure of not producing or
19 logging such documents. Those documents did not become responsive simply because they were
20 forwarded from Jennifer McAleese to her spouse, John McAleese. Accordingly, most of the
21 documents that Apple alleges that FlatWorld failed to list on its privilege log, but were listed by
22 John McAleese or MLB, were never listed or produced because they were simply not responsive to
23 the requests for production served on FlatWorld at that time (though they may have been
24 responsive to the subpoenas to John McAleese and MLB), had no obvious relevance to this
25 litigation, or contained attorney-client communications dated after the filing date of the Complaint
26 in this case.

27 b. Three of the documents listed on the privilege logs of John McAleese or MLB but
28 not on FlatWorld’s privilege log were produced. Document MLB_F0000180 was produced by

FlatWorld as FWAPP00002556. Document JMPriv143A was produced by FlatWorld as FWAPP00003930. Document JMPriv155 was produced by FlatWorld as FWAPP00006751.

c. Twelve of the emails or email threads listed on the privilege logs of John McAleese or MLB but allegedly not on FlatWorld's privilege log are listed on FlatWorld's privilege log:

| Entry from Privilege Logs of John McAleese or MLB | Entry from FlatWorld's Privilege Log |
|---|--------------------------------------|
| JMPriv041 | PRIV0215D ³ |
| JMPriv045 | PRIV0783 |
| JMPriv049F | PRIV0386B |
| JMPriv049G | PRIV0386C |
| JMPRIV049H | PRIV0386D |
| JMPriv052G | PRIV0386B |
| JMPriv052H | PRIV0386C |
| JMPriv052I | PRIV0386D |
| JMPriv057E | PRIV0386B |
| JMPriv057F | PRIV0386C |
| JMPriv057G | PRIV0386D |
| JMPriv062E | PRIV0386B |
| JMPriv062F | PRIV0386C |
| JMPriv062G | PRIV0386D |
| JMPriv065D | PRIV0386B |
| JMPriv065E | PRIV0386C |
| JMPriv065F | PRIV0386D |
| JMPriv070B | PRIV0386D |
| JMPriv075B | PRIV0386D |
| JMPriv075C | PRIV0386D |
| JMPriv077A | PRIV0625F |
| JMPriv192A | PRIV0761 |
| MLB_F0000258A | PRIV0761A |

d. Well before this litigation began, Jennifer McAleese used other email accounts which have since been closed and to which she no longer has access. These email accounts were closed in 2008 and 2009 before FlatWorld could have pursued litigation against Apple since the patent was then undergoing reissue examination. The circumstances of why these email accounts were closed are explained in the concurrently filed Declaration of Jennifer McAleese. To the best

³ The presence of a letter after the privilege number represents a subpart of one thread. The bulk of the documents in this category represent subparts of one email thread, which was listed on FlatWorld's privilege log as PRIV0386.

1 of my knowledge, neither of these accounts were closed with the intent of concealing or destroying
2 information, nor are they likely to have contained any information that would be material to
3 resolving any of the claims or defenses in this case (*i.e.*, their contents have no significant
4 relevance to infringement, invalidity, etc.). Eight emails or email threads listed on the privilege
5 logs of John McAleese and/or MLB were not produced because they were sent to or from one of
6 these closed email accounts and were no longer in the possession of FlatWorld.

7 e. The remaining thirty-six documents were overlooked despite the reasonable and
8 thorough search of paper and electronic documents conducted by FlatWorld to respond to Apple's
9 discovery requests. None of these documents were purposely withheld, concealed, or destroyed.
10 All of these documents are privileged and would have been entered on FlatWorld's privilege log
11 had they been located. These twenty-two documents represent a relatively small number when
12 compared to FlatWorld's 440-page privilege log listing 1,316 privileged communications, between
13 2 and 3 percent of the total.

14 f. Rembrandt IP also received a third party subpoena from Apple and produced
15 documents and a privilege log in response to that subpoena. Seven of the emails or email threads⁴
16 that appeared on Rembrandt's privilege log but not on FlatWorld's privilege log were simply not in
17 the possession of FlatWorld because they were sent to or from Jennifer McAleese's closed
18 FlatWorld Interactives email account. The concurrently filed Declaration of Jennifer McAleese
19 explains the reason that this account was deactivated in 2009. One document REM-00000867 was,
20 in fact, produced by FlatWorld as FWAPP00006809. Two emails and one letter were inadvertently
21 not listed on the privilege log because they were overlooked, not because they were purposely
22 concealed, withheld, or destroyed. These three documents would have been listed on FlatWorld's
23 privilege log had they been located. Again, this is a relatively small number of documents when
24 compared to the total length and number of entries on FlatWorld's privilege log.

25 8. I am unaware of any confidential Apple information given to me, Hagens Berman,
26 or anyone employed by or working on behalf of Hagens Berman, by John McAleese, Jennifer

27 ⁴ Each email thread appearing on Rembrandt IP's privilege log was separated into its individual
28 subsections, thus expanding the number of entries on the log.

1 McAleese, or Slavoljub Milekic. The only confidential Apple information that I have seen was
 2 produced by Apple in response to this Court's disclosure requirements and FlatWorld's discovery
 3 requests.

4 9. I have reviewed Apple's Motion to Disqualify Hagens Berman, the supporting
 5 Declaration of Michael Pieja, and the exhibits thereto. I understand that Apple represents that John
 6 McAleese used Jennifer McAleese as a conduit to indirectly communicate confidential Apple
 7 information and legal advice to Hagens Berman. To the best of my knowledge, these
 8 representations are utterly false. I understand also that Apple accuses Hagens Berman of
 9 intentionally destroying documents. To the best of my knowledge, these accusations are utterly
 10 false and offensive.

11 10. On May 17, 2013, I sent an email to Apple's counsel, Aaron Taggart, requesting
 12 that Apple comply with document requests served by FlatWorld and provide a complete privilege
 13 log. In that email, I stated:

14 Further, Apple has stated in its disqualification motion that "Morgan Lewis has
 15 prosecuted hundreds of patent applications relating to the touch- and gesture-
 16 based user interface of the iPhone" and "[t]his technology-the touch interface of
 17 the iPhone and other Apple products- is what FlatWorld accuses of infringement
 18 in the present case." By Apple's own admission, Apple has had communications
 19 with MLB that are relevant to the present litigation. Those communications
 20 should have been produced or logged. Since Apple has accused FlatWorld and
 21 Hagens Berman of wrongdoing relating to these documents, it is particular [sic]
 22 troubling that Apple has not produced or logged any of these
 23 documents. FlatWorld demands that Apple produce or log all such documents.

24 In response, Mr. Taggart sent a May 31, 2013 letter in which he stated:

25 In response to your "demand[] that Apple produce or log" communications
 26 between Apple and Morgan Lewis regarding patent prosecution, *Apple has not*
 27 *admitted or suggested that such communications are relevant to the present*
 28 *litigation.* Support for the excerpts of Apple's motion to disqualify that you have
 quoted can be found on the face of those patents prosecuted by Morgan Lewis and
 in public documents available from the USPTO. Accordingly, the excerpts of
 Apple's motion you have quoted do not implicate any particular communications
 between Apple and Morgan Lewis. *If FlatWorld has any other basis for believing*
that correspondence between Apple and its prosecution counsel regarding patents
not at issue in this case are relevant to any claim or defense, please provide it
promptly so that we may consider it. [emphasis added]

1 Attached as Exhibit 1 is a true and correct copy of excerpts of Mr. Taggart's May 31 letter. The
2 quoted section has been highlighted.

3 11. I was one of the attorneys who worked on preparing FlatWorld's privilege log in
4 this litigation. I reviewed the documents containing communications between Jennifer McAleese
5 and John McAleese; all of these documents pre-dated the time at which FlatWorld engaged Hagens
6 Berman. I believed that he was either rendering legal advice or being asked to render legal advice
7 in these documents. Since I knew that he was an attorney, I designated these communications as
8 being covered by the attorney-client privilege. I did not realize until after Mr. McAleese's call to
9 Mark Carlson on February 26, 2013 that neither Mr. McAleese nor FlatWorld considered Mr.
10 McAleese to be FlatWorld's attorney and that, therefore, designating these communications as
11 subject to the attorney-client privilege was incorrect. I did not know that Jennifer McAleese had
12 forwarded any emails, papers, or pleadings from this case to Mr. McAleese until after the
13 document productions of MLB and John McAleese in March and April, 2013.

14 I declare under penalty of perjury that the foregoing is true and correct.

15 Signed in Seattle, Washington, this 11th day of June, 2013.

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Ryan Meyer

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2013, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the email addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List. Any non-CM/ECF participants will be served by electronic mail, facsimile and/or overnight delivery.

/s/ Steve W. Berman
STEVE W. BERMAN